United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

388

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24381

UNITED STATES OF AMERICA, Appellee,

v.

WILLIE S. KING, Appellant

Appeal from the United States District Court

for the District of Columbia

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* Casea mainly relied on.

ISSUES PRESENTED* **

In the opinion of appellant, the following issue is presented:

Whether the photograph of a lineup of the defendant, shown to the witnesses over fourteen months after the alleged robbery, and on the actual date of trial right before the jury was impaneled, was so unnecessarily suggestive and conducive to irreparable mistaken identification that the appellant was denied due process of law?

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*This case has not previously been before this Court.
**References to Rulings - None

STATEMENT OF THE CASE

Prior to the trial, the Court held a Wade-Stovall hearing (Tr.8-9)out of the presence of the jury to determine whether three witnesses present on January 4, 1969, at a Safeway robbery, could identify the appellant in open court before a jury, on March 16, 1970, when such witnesses had not seen the appellant since January 4, 1969, the date of the robbery. It is not apparent as to why the appellant was never placed in a lineup (Tr.8-9) for the Government witnesses, Mr. Pennell (correct spelling Pernell Tr.376), Mr. Hobson and Mr. Wilkes, to view at the time of the robbery, on January 4, 1969, rather than waiting until over fourteen months later, namely to March 16, 1970, and requesting that these witnesses view a picture of the lineup (Tr.10-11), and based on whether or not they can identify the appellant from the lineup photograph, to permit an in-Court identification at the trial(Tr.12). The witness, Mr. Hobson (Tr.9) went to a 15- or 16-man lineup held on January 5, 1969, in which the appellant was not present. Mr. Hobson indicated one of the men in the lineup looked like the robber but made no identification.

Detective Dory (Tr.9-10) went to the Safeway store the day after the robbery and showed photographs of the appellant to Mr. Hobson and Mr. Wilkes who were unable to identify the appellant from the photographs. The photographs of the appellant, one being a frontal and one a profile view, shown were dated 1965.

The defense counsel strenuously objected to this procedure (Tr.12) citing Wade, Gilbert and Stovall (U.S. v. Wade, 388 U.S. 218, Gilbert v. California, 388 U.S. 263 and Stovall v. Denno, 388 U.S. 293). The defense counsel contended that showing these witnesses a picture of the lineup immediately before trial would reinforce the image, if the witnesses identified the appellant. Defense counsel pointed out that the appellant had been incarcerated for nearly five months after his arrest (Tr.12) because he was unable to make bond and thus the Government had ample opportunity to conduct a lineup.

The defense counsel made further vigorous objection to this procedure contending that the appellant would be irreparably harmed if he was picked out of the lineup because an image at this date would go through to the trial.

The Government stated that they would show the photographs to the witnesses (Tr. 13) and invited the defense counsel to be present at the time the witnesses viewed the picture of the lineup.

The Court permitted (Tr.17-18) the Government to take the lineup photograph and to show it singly to the three witnesses in a separate room, with one witness at a time viewing the photograph and in the presence of the Court reporter and the Government prosecutor and the defense counsel.

At 11:00 a.m., on March 16, 1970, Mr. Hobson was taken into the witness room of Courtroom No. 4 of the United States District Court and in the presence of the prosecutor and the defense counsel was shown the lineup photograph in which there

were nine individuals. Mr. Hobson picked out the appellant as being No. 5 in the lineup photograph (Tr. 25). Thereafter, (Tr.26-27) the same procedure was followed with the witness Wilkes, who picked out the appellant as being the fifth man in the lineup photograph. Thereafter the same procedure was followed with Mr. Pannell (Tr.27-28)(Pernell), who could not recognize and positively identify the appellant from the line-up photograph. Mr. Pernell, during the trial (Tr.376) was asked to make an in-Court identification of the appellant and stated he could not recognize anyone in the courtroom that was involved in the robbery of the Safeway store on January 4, 1969.

Mr. Hobson made an in-Court identification of the appellant (Tr.525) during the trial.

Mr. Wilkes made an in-Court identification of the appellant during the trial (Tr.458).

During the trial, Mr. Norman Creel, the manager of the Safeway store made an identification of the appellant as being the party to rob the Safeway store (Tr.178) on January 4, 1969. During the course of the trial Mr. Stubbs, an employee present during the robbery could not make an identification of the appellant. Mr. Stokes, an employee of Safeway and present during the robbery of January 4, 1969, (Tr.378-385) while giving testimony concerning the robbery, never identified the appellant

and was never asked to identify the appellant during the trial. Mr. Banks, an employee of Safeway and present at the robbery on January 4, 1969, could not make an identification of the appellant as one of the robbers during the trial (Tr.399). Mrs. Bertha Tucker, an employee of Safeway and present during the robbery of January 4, 1969, could not make an identification of the appellant during the course of her testimony in the trial (Tr.504). Mr. Bowman, a Safeway guard present during the robbery of January 4, 1969, could not make an identification of the appellant during the course of the trial (Tr.429).

ARGUMENT

The appellant was denied due process of the law by having two witnesses shown a photograph of ath lineup immediately before the start of the trial to reinforce and bolster the identification of the appellant, and thereafter permit the witnesses to make an in-Court identification.

(U.S. v. Wade, 388 U.S. 218; Stovall v. Denno, 388 U.S. 293; Gilbert v. California, 388 U.S. 263.)

The photographs of the lineup were shown to the witnesses fourteen months after the event, namely the robbery of January 4, 1969, the photographs being shown to the witnesses on March 16, 1970, when memories would obviously have faded, and hence the only purpose of showing the photograph of the lineup was to bolster the Government's case by identification.

The appellant should have been presented at a lineup immediately after the robbery of January 4, 1969, in accordance with the John Adams v. U.S., 135 U.S. 8th App. 203; 130 F.2d 574, to determine whether or not the witnesses could make an independent and objective judgment, not tainted by being shown a lineup photograph when the witnesses have been subpoenaed for a trial that is to begin immediately after the witnesses have been shown a lineup photograph in the Courthouse by the prosecutor. U. S. v. Wade, supra, Stovall v. Denno, supra.

During the course of the trial, six witnesses who were present at the crime could not identify the appellant, while

the manager could and the two witnesses who had seen the photographs of the lineup in the witness room immediately prior to trial. It is submitted that these photographs shown to these witnesses fourteen months after the event, when their memories obviously would have faded, could only be used to reinforce the identification and were not obtained from an independent source.

The witnesses had never seen the individual involved in the alleged crime prior to the event, and since the trial was fourteen months after the crime, it is apparent an in-Court identification of the appellant would not have been arrived at independent of improper photographic identification.

The appellant was further in the custody of the police for five months because he could not make bond, and a lineup could have been arranged for the witnesses to view the appellant. There was no need for a photographic identification since the suspect had been apprehended. Thus, the identification was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification and hence there was a serious and irreconcilable breach of the due process of law. U.S. v. Washington, 292 F.Supp 284, D.C.D.C. (Judge Youngdahl) See Wade, Stovall, Gilbert, supra

CONCLUSION

WHEREFORE, appellant respectfully submits that the judgment of the District Court should be reversed.

Respectfully submitted,

Lawrence J. Winter
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I, Lawrence J. Winter, have delivered a copy of this Brief to the United States Attorney, United States Courthouse, Washington, D.C., this 14 day of December, 1970.

Lawrence J. Winter

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,351

UNITED STATES OF AMERICA, APPELLEE

v.

WILLIE S. KING, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JOHN T. EVANS,
ROBERT J. HIGGINS,
Assistant United States Attorneys.

Cr. No. 502-69

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* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED *

In the opinion of appellee the following issue is presented:

Did the prosecutor violate any of appellant's constitutional rights by showing to two witnesses, on the day of trial and in the presence of appellant's counsel, a photograph of an earlier lineup at which appellant was represented by counsel?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,381

UNITED STATES OF AMERICA, APPELLEE

v.

WILLIE S. KING, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed on April 10, 1969, appellant and a co-defendant, Fred D. Smith, were charged in twenty-nine counts with armed robbery, robbery, assault with a dangerous weapon and carrying a dangerous weapon. They were tried by a jury in the District Court before the Honorable Aubrey E. Robinson, Jr., on March 16, 17, 18, 19, 20, 23 and 24, 1970, and found guilty as charged.[1] On May 21, 1970, appellant was sentenced to

[1] On motion of the Government, counts four through six, ten through fifteen, and nineteen through twenty-four were dismissed before trial.

serve five to twenty years on each of the three armed robbery counts and three to nine years on each of the four assault with a dangerous weapon counts, the sentences to be served concurrently.[2] This appeal followed.

On January 4, 1970, at about 8:50 p.m., six men, several of whom were armed, robbed the Safeway store located at 301 Rhode Island Avenue, Northwest. Among the witnesses present were Norman L. Creel, Jr., the store manager, and three Safeway employees, Julius Hobson, Jr., Duane E. Wilkes, and Charles Pannell. The morning after the robbery Mr. Creel and Mr. Wilkes went to the Robbery Squad office and looked at 200 to 300 photographs.[3] Mr. Creel tentatively identified photos of appellant and Fred Smith (Tr. 42). Mr. Wilkes "had an idea" as to the identity of one of the robbers but was not "absolutely positive" (Tr. 119-120; *cf.* Tr. 300).[4]

Two days later, while at the Court of General Sessions for an entirely unrelated case, Mr. Creel saw appellant and Smith in the audience in Courtroom 11. He was positive they were two of the robbers and immediately informed a police officer, who then talked to both men and ascertained their identities (Tr. 44-46). About a week later Creel again identified both men from a group of over forty photographs shown to him by a police officer (Tr. 66, 77-79). On January 28, appellant and Smith appeared in a nine-man lineup and were again identified by Mr. Creel, the only witness who had been invited to attend (Tr. 45-46, 100).

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[2] On June 2, 1970, the co-defendant Smith was sentenced to serve a maximum of ten years on all counts under the Federal Youth Corrections Act, 18 U.S.C. § 5010 (c). Smith did not appeal from his conviction.

[3] Detective Dory's notes reflected that Mr. Hobson was also present, but Hobson was not questioned in this connection (Tr. 94, 105-113, 138-139).

[4] The record reflects that the photograph of appellant, who was born on March 29, 1947, had been taken on June 9, 1965, or some three and one-half years prior to the date of the robbery. Mr. Smith's picture had been taken two years before the robbery (Tr. 125-126).

On the morning of trial, the prosecutor informed the court that in addition to Mr. Creel, Mr. Hobson, Mr. Wilkes and Mr. Pannell had all told him that they believed they could identify appellant. The prosecutor said that he believed he had the right to put each of these witnesses on the stand and inquire whether they saw any of the robbers in the courtroom. Because of the time which had elapsed since the crime and because none of these witnesses had ever attended a lineup, however, the prosecutor suggested that in the interests of fairness he would show to each of the witnesses, in the presence of appellant's counsel and prior to their seeing appellant in the courtroom at counsel table, a photograph of the lineup which Mr. Creel had attended and at which appellant had been represented by counsel (Tr. 8-20). Over appellant's objection that procedure was followed.[5] Both Mr. Hobson and Mr. Wilkes positively identified appellant as the fifth man in the nine-man lineup (Tr. 25, 27). Mr. Pannell said that the fifth man "resembled" the robber but he could not be "positive" (Tr. 28).

After the photographic identification made by Hobson and Wilkes, a hearing was held on the question of the identification testimony to be introduced by the Government at trial. At the hearing Mr. Hobson testified that on the day of the robbery he had looked at appellant for "a minute to a minute and a half" under "very good" lighting conditions at a distance of "no more than 4 feet" (Tr. 108-110). He said that to his knowledge he had not seen appellant since the robbery, but he was "certain," from both his examination of the lineup photograph and his viewing of appellant in court, that appellant was one of the robbers (Tr. 111).[6]

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[5] A court reporter was present, and that proceeding is recorded at Tr. 24-29.

[6] Mr. Hobson, along with Mr. Creel, had attended a lineup on February 4 in which neither appellant nor Smith was a participant. Neither Hobson nor Creel made any identification at that lineup. Inadvertently, Mr. Hobson had not been asked to attend the January 28 lineup at which appellant and Smith were identified by Creel (Tr. 9-10, 78, 233-234, 539-544).

Mr. Wilkes' testimony was similar. At the time of the robbery, he had looked at appellant for "a minute and one-half or two minutes" at a distance of "no more than eight feet" (Tr. 117-118). The next day he viewed several hundred photographs along with Mr. Creel but could not be sure of anyone.[7] He said that to his knowledge he had not seen appellant since the robbery, but like Mr. Hobson he was "certain" that appellant was one of the robbers.[8]

At the conclusion of all the evidence the District Judge ruled that the showing of the lineup photograph to the witnesses Hobson and Wilkes was not impermissibly suggestive, and therefore their identification testimony was held admissible (Tr. 129-141).[9]

At trial appellant was identified in court by Mr. Creel, Mr. Hobson and Mr. Wilkes.[10] All three witnesses also testified as to their previous photographic and in person identifications of appellant (Tr. 214-223, 234, 467-476, 539, 545-547). Other witnesses called by the Government testified to the facts of the offense[11] but could not identify any of the robbers.[12]

Appellant testified that on the day of the robbery he had gone with his wife and baby to visit his cousin, Jonathan Caldwell, and his wife. He said that he arrived at the Caldwells' one-bedroom apartment early on the afternoon of January 4 and that neither he, his wife nor the Caldwells left the apartment until the afternoon of Janu-

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[7] See note 4, *supra*.

[8] Mr. Creel also testified at the hearing and recited the facts of his identifications by photograph, at the Court of General Sessions and at the lineup (Tr. 34-82).

[9] The trial judge also held that Mr. Creel would be permitted to identify appellant (Tr. 129-132).

[10] Mr. Creel also identified Smith (Tr. 200-202).

[11] These witnesses also provided needed testimony with respect to the multiple charges of assault with a dangerous weapon.

[12] The other four men involved in the robbery were never identified by anyone.

ary 5. Moreover, he said that during that period of time no one else came to the Caldwells' apartment (Tr. 843-893). His testimony was broadly corroborated by his wife and by Mr. and Mrs. Caldwell (Tr. 657-736, 776-812, 813-840).

Fred Smith testified that at the time of the offense he was at home watching television (Tr. 893-919).

At the conclusion of all the evidence, appellant and Smith were found guilty as charged.

ARGUMENT

There was no constitutional violation in the prosecutor's showing to two witnesses, on the day of trial and in the presence of appellant's counsel, a photograph of an earlier lineup at which appellant was represented by counsel.

(Tr. 8-29, 124)

The essence of appellant's argument appears to be that he should have been presented at a lineup immediately after his arrest for the Safeway robbery. Failure to do so, reasons appellant, should bar the Government from eliciting *any* identification testimony from *any* witnesses. That argument is fatally defective for two independent reasons. First, it presumes that a criminal defendant has the unqualified right to be presented in a lineup. That is not the law. *United States* v. *Hamilton*, 137 U.S. App. D.C. 89, 91 n.11, 420 F.2d 1292, 1294 n.11 (1969); *Kennedy* v. *United States*, 122 U.S. App. D.C. 291, 353 F.2d 462 (1965) (Burger, J.); *United States* v. *Munroe*, 421 F.2d 644 (5th Cir. 1970); *United States* v. *Ravich*, 421 F.2d 1196 (2d Cir. 1970). Second, it ignores the fact that the picture shown to the witnesses was of a lineup conducted in the presence of appellant's counsel. Assuming *arguendo* that a right to a lineup existed, it is clear that the photographic lineup substantially protected that right, particularly where the array depicted was conced-

edly fair.[13] *See United States* v. *Collins*, 416 F.2d 696 (4th Cir. 1969).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JOHN F. EVANS,
ROBERT J. HIGGINS,
Assistant United States Attorneys.

[13] The trial court permitted Mr. Creel, the sole witness at that lineup, to testify as to his identification there. Moreover, appellant's trial counsel had no objection to the fairness of that lineup, (Tr. 124) and no issue in that regard has been raised on appeal.

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